SOO SING & TWO ORS. v. PUBLIC PROSECUTOR.

[Court of Appeal (Foster Sutton, C.J., Taylor and Wilson, JJ.) June 12, 1951]

[F.M. — Criminal Reference No. 5 of 1951]

Emergency Regulations — Regulations 6A(1) and 5(1A) — Consorting with a person within the meaning of the word "consorts" as used in regulation 6A(1).

Shortly put, the facts of the case were as follows: On the 11th of December, 1950, a Security Force Patrol operating in the area of the Batu Belang Estate, Bahau, in the State of Negri Sembilan, came across the three appellants apparently conversing with a bandit armed with a gun or rifle who was accompanied by two women. The appellants were seated on the ground, and the armed bandit was standing close to them. As the Patrol approached, the armed bandit ran away accompanied by the two women, and shots were exchanged between the bandit and the Patrol. The three appellants were still sitting on the ground when the Patrol came up to, and arrested, them.

The appellants were charged and convicted under regulation 6A(1) and sentenced to five years rigorous imprisonment.

Held, where the only evidence for the prosecution is that an accused person has been found in the company of an armed bandit, as was the case here, a conviction for consorting under regulation 6A(1) is not justified. In order to justify a conviction for consorting under that regulation, the prosecution has to go further by establishing circumstances which entitle the Court to draw the conclusion that the association was something more than a casual meeting or conversation. On the other hand, in the absence of a satisfactory explanation by the accused, such evidence would entitle the Court to convict under regulation 5(1A).

The King v. **Power**[1] held not applicable in the Magistrate's Courts of the Federation of Malaya.

The Court set aside the conviction under regulation 6A(1) and substituted conviction under regulation 5(1A) and reduced the sentence from five years to two years rigorous imprisonment.

Case referred to :—

(1) *The King v. Power* (1919) 1 K.B. 572.

CRIMINAL REFERENCE.

R. V. H. Rintoul for the appellants.

D. C. Jackson (Federal Counsel) for the Public Prosecutor.

Cur. Adv. Vult.

Judgment of the Court of appeal was delivered by :—

Foster Sutton, C.J. : — This is a Reference to the Court of Appeal by Abbott, J. under the provisions of section 34 of the Courts Ordinance, 1948. The questions asked in the Reference are stated as follows :—

"1. That the decision in the case of **The King** v. **Power**, (1919) 1 K.B. 572 is without application in the Magistrates' Courts of the Federation of Malaya; and

2. That, at the conclusion of the case presented against the Appellants by the prosecution, there was sufficient evidence that the Appellants were consorting with a person within the meaning of the word "consorts" as used in sub-regulation (1) of regulation 6A of the Emergency Regulations, 1948."

Shortly put, the facts of the case are as follows: On the 11th of December, 1950, a Security Force Patrol operating in the area of the Batu Belang Estate, Bahau, in the State of Negri Sembilan, came across the three appellants apparently conversing with a bandit armed with a gun or rifle who was accompanied by two women. The appellants were seated on the ground, and the armed bandit was standing close to them. As the Patrol approached, the armed bandit ran away accompanied by the two women, and shots were exchanged between the bandit and the Patrol. The three appellants were still sitting on the ground when the Patrol came up to, and arrested, them.

On the first question asked in the Reference, Mr. Rintoul, for the appellants, submitted that in view of the terms of paragraph (f) of section 173 of the Criminal Procedure Code, the answer should be in the affirmative, and Mr. Jackson, on behalf of the Public Prosecutor, stated that he conceded the point.

Paragraph (f) reads as follows :—

"If, upon taking all the evidence hereinbefore referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal."

In *The King v. Power*[1], the Court of Criminal Appeal in England held that where a submission is made at the close of the case for the prosecution that there is no case for the prisoner to answer, and the submission is over-ruled, and witnesses are called for the defence by whom evidence is given incriminating the prisoner, the Court of Criminal Appeal is entitled, on an appeal by the prisoner against conviction, to take into consideration the adverse evidence given by the witnesses for the defence.

Section 173 of the Criminal Procedure Code lays down the procedure to be followed by Magistrates in summary trials. The "evidence hereinbefore referred to" in paragraph (f) of that section has reference only to the evidence given for the prosecution. That being so, it is the duty of a Magistrate at the close of the case for the prosecution to determine whether or not the evidence tendered on behalf of the prosecution, if un-rebutted, has established the case against the prisoner beyond all reasonable doubt. It follows, therefore, that, in our view, the answer to the first question is in the affirmative.

On the second question, Mr. Rintoul submitted that the evidence given by the prosecution against the appellants did not justify a conviction for consorting under regulation 6A(1) of the Emergency Regulations,

1948, as it discloses no more than that they were "in the company of" an armed bandit. He conceded that they might have been convicted, if charged under regulation 5(1A) with being "found in the company of" an armed bandit, but contended that, in order to justify a conviction for "consorting", the prosecution was bound to prove something more than mere presence with an armed bandit, and that the difference in the wording of regulations 5(1A) and 6A(1) clearly shows that a difference was intended.

Mr. Jackson did not seriously contest the proposition that the prosecution's evidence brought the case within the scope of regulation 5(1A) rather than regulation 6A(1).

Where the only evidence for the prosecution is that an accused person has been found in the company of an armed bandit, as was the case here, a conviction for consorting under regulation 6A(1) is not justified. In order to justify a conviction for consorting under that regulation, the prosecution has to go further by establishing circumstances which entitle the Court to draw the conclusion that the association was something more than a casual meeting or conversation. On the other hand, in the absence of a satisfactory explanation by the accused, such evidence would, in our opinion, entitle the Court to convict under regulation 5(1A). It follows, therefore, that our answer to the second question is in the negative.

In all the circumstances, we consider that justice will be done in this case by our setting aside the conviction for consorting under regulation 6A(1), and substituting therefor a conviction under regulation 5(1A). We agree with Mr. Rintoul's submission that the sentence of five years rigorous imprisonment, for what may properly be regarded as a lesser offence, would be unduly severe. We accordingly reduce the sentence in each case to one of two years rigorous imprisonment, the sentences to run from the date of arrest.

Order accordingly.

PUBLIC PROSECUTOR v. TAY YAM PENG.

[Court of Appeal (Foster Sutton, C.J., Taylor and Abbott, JJ.) June 12, 1951]

[F.M. — Criminal Reference No. 4 of 1951]

Evidence Ordinance, s. 26 — Whether a Chandu Officer is a Police Officer.

In this case the question for the determination of the Court was whether a Chandu Officer, who is not a member of the Police Force of the Federation, is a Police Officer within the meaning of section 26 of the Evidence Ordinance, 1950.

Held, that the words "police officer" in section 26 of the Evidence Ordinance must be given their ordinary every-day meaning. Applying that test, a Chandu Officer is not a Police Officer within the meaning of that section.

Obiter — Tan Shu En & Anor. v. Public Prosecutor(1) is not a decision of a Court of co-ordinate jurisdiction with the Court of Appeal, and although the Court of Appeal would always give great weight to such a decision, it is not binding upon it.

Rex v. Man Woo(2) applied.

Cases referred to :—

(1) *Tan Shu En & Anor. v. Public Prosecutor* (1948) M.L.J. 196.

(2) *Rex v. Man Woo* (1951) M.L.J. 20; 2 M.L.R. 39.

CRIMINAL REFERENCE.

T. V. A. Brodie (Solicitor General) for the Public Prosecutor.

R. Ramani for the respondent.

Cur. Adv. Vult.

Judgment of the Court of Appeal was delivered by :—

Foster-Sutton, C.J. : — This is a Reference to the Court of Appeal by the Public Prosecutor, under section 34 of the Courts Ordinance, 1948, by which we are asked to determine :—

"Whether a Chandu Officer, who is not a member of the police force of the Federation, is a Police Officer within the meaning of section 26 of the Evidence Ordinance, 1950."

On behalf of the Public Prosecutor, the Solicitor General submitted that —

"the natural and ordinary meaning of police officer is not and does not include a person who is charged only with enforcing one Ordinance, that a police officer is a person charged with the duty of general law enforcement",

and that such powers as a Chandu Officer has are confined solely to those conferred upon him by the Opium and Chandu Proclamation. He invited us not to follow the decision in the case of *Tan Shu En and Another v. Public Prosecutor*(1), which was an appeal from a conviction by the District Judge, Penang, for possession of opium, reserved for hearing before a Court of three Judges under the provisions of section 306(3) of the Straits Settlements Criminal Procedure Code. In that case the Court held, *inter alia,* that a Chandu Officer under the Opium and Chandu Proclamation is a police officer for the purposes of sections 25 and 26 of the Evidence Ordinance.

The Solicitor General submitted that the decision of Murray-Aynsley C.J. (Singapore) in the case of *Rex v. Man Woo*(2), which was decided in a contrary sense to that of the former case, was the better view,